perty used in the manufacture. The law was subsequently modified, limiting its operation to persons engaging in the manufacture prior to August 1st 1861, limiting the exemption to five years, and the amount of bounty money to one person to $5000. The modification was held valid; the original act was not a contract by the state with persons engaging in the manufacture of salt; it was a law dictated by public policy and the general good, a bounty law, like the laws offering rewards for the killing of destructive animals; one that might be changed whenever the legislative body thought fit to change or modify its policy on the subject: *Salt Co.* v. *East Saginaw*, 13 Wall. 373. W. H. BURROUGHS.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

DANIEL WEBSTER *v.* CLARK W. UPTON, ASSIGNEE.

The transferee of stock on the books of an insurance company, on which the full nominal value has not been paid, is liable for calls on the unpaid portion made during his ownership, without an express promise.

The capital stock of a business corporation is a trust fund for the protection of creditors, and neither stockholders nor directors can withhold or release any part of it from the claims of such creditors.

The stock in this sense is the whole stock, not merely the percentage of it called in or paid.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

The Great Western Insurance Company, of which the plaintiff below was the assignee in bankruptcy, was incorporated under the laws of Illinois in 1857, with general power to insure all kinds of property against both fire and marine losses. Subsequently to its organization its capital was increased to more than one million of dollars, and it was authorized by law further to increase its capital to $5,000,000. It did not appear, however, from the record, that of the stock subscribed more than about $222,000 was ever paid in, a sum equal to nearly twenty per cent. of the par value, leaving over $965,000 of subscribed capital unpaid. In this condition the company went into bankruptcy in 1872, owing a very large sum, equal to if not greater than its entire subscribed capital, and Clark W. Upton, the plaintiff, became the assignee. The District Court then directed a call to be made for the eighty per cent. remaining

unpaid of the capital stock. A call was accordingly made, and payments having been neglected, the assignee brought this suit against the defendant, averring that he was the holder of one hundred shares, of the par value of one hundred dollars each, and, as such, responsible for the eighty per cent. unpaid. On the trial evidence was given tending to show that one —— Hale was the owner of a large amount of the stock of the company, for which he held the company's certificates, and that he had, through his brother, sold one hundred shares to the defendant, on which twenty per cent. had been paid. The books of the company had been destroyed in the great fire in Chicago in 1871, but there was evidence tending to show that the defendant's name was on the stock ledger, and that the defendant transferred, or caused the stock bought from Hale to be transferred to himself on the books of the company. The district judge submitted to the jury to find whether the defendant actually thus became a stockholder, recognised as such on the books of the company, instructing them that if he did he was liable for the eighty per cent. unpaid as if he had been an original subscriber. A verdict and judgment having been recovered by the plaintiff, the case was removed by writ of error to the Circuit Court, where the judgment was affirmed, and the case came by writ of error to this court.

The opinion of the court was delivered by

STRONG, J.—The leading assignment of error here is that the court below erroneously ruled that an assignee of stock, or of a certificate of stock in an insurance company, is liable for future calls or assessments without an agreement or promise to pay. This, however, is not a fair statement of what the court did rule. The court instructed the jury, in effect, that the transferee of stock on the books of an insurance company, on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion, made during his ownership, without proof of any express promise by him to pay such calls. This instruction, we think, was entirely correct. The capital stock of an insurance company, like that of any other business corporation, is a trust fund for the protection of its creditors or those who deal with it. Neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company. And the stock thus held in trust is

the whole stock, not merely that percentage of it which has been called in and paid. This has been decided so often that it has become a familiar doctrine. But what is it worth if there is no legal liability resting on the stockholders to pay the unpaid portion of their shares unless they have expressly promised to pay it? Stockholders become such in several ways: either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription, and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company, in many cases not more than five per cent.; in the present only twenty. Then the company commences business and incurs obligations, representing all the while to those who deal with it that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has been actually paid in. This cannot be. If it is, very many corporations make fraudulent representations daily to those who give them credit. The Great Western Insurance Company reported to the auditor of public accounts, as required by law, that the amount of its capital stock outstanding (par value of shares $100 each) was $1,188,000; that the amount of paid up capital stock was $222,831.42, and that the amount of subscribed capital for which the subscribers or holders were liable was $965,168.58. This report was made on the 10th of January 1871. Thus those who effected insurances with the company were assured that over one million of dollars were held as a trust fund to secure the company's payment of their policies. But if the subscribers and holders of the shares are not liable for the more than eighty per cent. unpaid, the representation was untrue. Persons assured have less than one-fifth the security that was promised them. This is not what the statutes authorizing the incorporation of the company contemplated. The stock was required to be not less than a given amount, though the company was authorized to commence business when five per cent. of that amount was paid in. Why fix a mini-

mum amount of stock if all of it was not intended to be a security for those who obtained insurance? There is no conceivable reason for such a requirement, unless it be either to provide for the creditors a capital sufficient for their security, or to secure the stockholders themselves against the consequences of an inadequate capital. The plain object of the statute, therefore, would be defeated if there is no liability of the stockholder to pay the full prescribed amount of each share of his stock. With this plain object of the legislature in view it must be assumed, after the verdict of the jury, the defendant voluntarily became a stockholder. Either he must have designed to defeat the legislative intent, or he must have consented to carry it out. The former is not to be presumed. And if the latter was the fact, coming as he did into privity with the company, there is a necessary implication that he undertook to complete the payment of all that was unpaid of the shares he held whenever it should be demanded. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence—by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself into a position which requires the performance of duties.

What we have said thus far is applicable to the case of an original subscriber to the stock, and equally to a transferee of the stock who has become such by transfer on the books of the company. There are, it is true, decisions of highly respectable courts to be found, in which it was held that even a subscriber to the capital stock of an incorporated company is not personally liable for calls, unless he has expressly promised to pay them, or unless the act of incorporation or some statute declares that he shall pay them. Such was the decision of the Supreme Court of New York, reported in 17 Barbour 567, the case of the *Fort Edward and Fort Miller Plank-road Company* v. *Payne*. A similar ruling was made in *The Kennebec and Portland Railroad Company* v. *Kendall*, 31 Maine 470. A like ruling has also been made in Massachusetts. In most, if not all of these cases, it appeared that the law authorizing the incorporation of the companies had provided a remedy for non-payment of calls or assessments of the unpaid portions of the stock taken. The company was authorized to declare forfeited, or to sell the stock for default of the stockholder, and the

law having given such a remedy, it was held to be exclusive of any other. Yet in them all it was conceded that if the statute had declared the calls or assessments should be paid, an action of assumpsit might be maintained against the legal stockholder on a promise to pay, implied only from the legislative intent. Surely the legislative intent that the full value of the stock authorized and required to be subscribed, in other words, the entire capital, shall be in fact paid in when required, that it shall be real, and not merely nominal, is plain enough when the authority to exist as a corporation and to do business is given on condition that the capital subscribed shall not be less than a specified sum. A requisition that the subscribed stock shall not be less than one million of dollars, would be idle if the subscribers need pay only a first instalment on their subscriptions, for example, five per cent. Manifestly that would not be what the law intended, and if its intent was that the whole capital might be called in, it is difficult to see why a subscriber, knowing that intent and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares, when payment is required. It is, however, unnecessary to discuss this question further, for it is settled by the judgment of this court. In *Upton, Assignee of The Great Western Insurance Company* v. *Tribilcock*, decided at this term, we ruled that the original holders of the stock are liable for the unpaid balances at the suit of the assignee in bankruptcy, and that without any express promise to pay. The bankrupt corporation in that case was the same as in this.

But if the law implies a promise by the original holders or subscribers to pay the full par value, when it may be called, it follows that an assignee of the stock, when he has come into privity with the company, by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law, as laid down by the text-writers generally, and by many decisions of the courts: ***Bond*** v. *The Susquehanna Bridge*, 6 Har. & Johnson 128; *Hall* v. *United States Insurance Company*, 5 Gill 484; *Railroad Company* v. *Boorman*, 12 Conn. 530; *Huddersfield Canal Co.* v. *Buckley*, 7 Term 36. There are a very few cases, it must be admitted, in which it has been held that the purchaser of stock, partially paid, is not liable for calls made after his purchase. Those to which

we have been referred are *Canal Co.* v. *Sansom*, 1 Binney 70, where the question seems hardly to have been considered, the claim upon the transferee having been abandoned; and *Palmer* v. *The Ridge Mining Company*, 34 Penn. St. 288, which is rested upon *Sansom's Case*, and upon the fact that by the charter the company was authorized to forfeit the stock for non-payment of calls. We are also referred to *Seymour* v. *Sturgess*, 26 New York, 134, the circumstances of which were very peculiar. In neither of these cases was it brought to the attention of the court that the stock was a trust fund held for the protection of creditors in the first instance, a fund no part of which either the company, or its stockholders, was at liberty to withhold. They do not, we think, assert the doctrine which is generally accepted. In Angell & Ames on Corporations, sec. 534, it is said: "When an original subscriber to the stock of an incorporated company, who is so bound to pay the instalments on his subscription, from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights, but to the obligations of the original subscriber, and he is bound to pay up the instalments called for after the transfer to him. The liability to pay the instalments is shifted from the outgoing to the incoming shareholder. A privity is created between the two by the assignments of the one and the acceptance of the other, and also between them and the corporation, for it would be absurd to say, upon general reasoning, that if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock." So in Redfield on Railways, ch. 9, sec. vii., pl. 4, it is said the cases agree that whenever the name of the vendee of shares is transferred to the register of shareholders, the vendor is exonerated, and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books as a corporator; and being thus liable, there is an implied promise that he will pay calls made while he continues the owner.

All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the

payment of creditors when the company becomes insolvent. From this it is a legitimate deduction that the stock cannot be released, that is, that the liabilities of the stockholders cannot be discharged by the company, to the injury of creditors, without payment. The fact, therefore, that in this case the certificate of stock taken by the defendant below was marked "non-assessable" is of no importance. The suit is brought by the assignee in bankruptcy, who represents creditors, and, as against him, the company had no right to release the holders of the stock from the payment of the eighty per cent. unpaid.

The second assignment of error and the third are in substance that the court should not have admitted in evidence the order of the District Court directing a call by the assignee of the unpaid balance of the stock, and should not have ruled that the call made under the order was effective to make the liability of the defendant complete. That these assignments cannot be sustained was decided in *Carver* v. *Upton*, a case before us at this term. Nothing more need be said in reference to them.

The last assignment of anything that can be assigned for error is that the court charged the jury as follows: "The only question is, was the defendant a stockholder of the company? If the testimony satisfies you that the defendant purchased of —— Hale one hundred shares of this stock, and that it was transferred in the books of the company, either by Webster, the defendant, or by Hale, who sold the stock, or by the direction of either of them, then the defendant is liable the same as if he had subscribed for the stock." The objection urged against this is that a transfer on the books directed by Hale, after the purchase by Webster, could not affect the latter's liability. But if Webster became the purchaser, it was his vendor's duty to make the transfer to him, where only a legal transfer could be made, namely, on the books of the company, and the purchase was in itself authority to the vendor to make the transfer. Still further it was Webster's duty to have the legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer: 3 De Gex & Smale Ch. 310. If so it is clear that the vendor may himself request the transfer to be made, and that when it is made at his request, the buyer becomes responsible for subsequent calls. This, however, does not interfere with the right of one who

appears to be a stockholder on the books of a company to show that his name appears on the books without right, and without his authority.

The judgment of the Circuit Court is affirmed.

With regard to some of the questions involved or touched upon in the above opinion, in this country the decisions have been by no means uniform, and as the topic is of considerable interest it may be well to review the course of the law bearing upon some of the more salient points arising out of subscriptions to the stock of corporations, the means of enforcing the same, and the liability of subscribers and stockholders.

I. Whether the mere subscription to the stock of a corporation, or an agreement to take stock in the same, creates a personal liability to pay for the stock without an express promise to that effect.

II. Whether, where a remedy by forfeiture or sale for non-payment of calls is given to the company, by statute or by-law, the company is confined to that remedy.

In order to avoid repetition, these two points may be treated together, as in many cases we meet them in company, and as in some of the cases the decision of the first has been deemed by some authorities to rest, to some extent at least, upon the existence of the power of forfeiture.

In Massachusetts, the leading case is *The Andover & Medford Turnpike Co.* v. *Gould*, 6 Mass. 40 (1809). The form of subscription was as follows: "Whereas the legislature has at the last session granted leave for making a turnpike road, * * * we, the subscribers, desirous of having the same completed as soon as possible, agree to take the said road, the number of shares set against our names, and be proprietors thereof." The act under which the company was incorporated gave the right of forfeiting the stock for non-payment of calls. It did not in terms restrict the company to that remedy. The defendant became delinquent. The company, waiving the forfeiture, brought assumpsit for the unpaid assessment. It was held that the contract did not amount to a promise to pay for, but only to *take* shares, and that the right to forfeit having been given by the legislature, it excluded by implication any other remedy; PARSONS, C. J., remarking: "But it is a rule, founded in sound reason, that when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way. When we find a power in the plaintiffs to make the assessments, they can enforce the payment in the method directed by the statute, and not otherwise, and that method is by the sale of the delinquent's shares."

This was followed by *The New Bedford and Bridgewater Turnpike Co.* v. *Adams*, 8 Mass. 138 (1811), wherein the court (SEDGWICK, SEWALL and PARKER, JJ.) said: "The general principle upon which they [the cases] all rest is, that where the party makes an express promise to pay the assessments he is answerable. Where, on the other hand, one, by subscribing the act of association, simply engages to become proprietor of a certain number of shares, without promising to pay assessments, then the only remedy which the corporation has is by sale of the shares to raise the sum assessed on them."

In *The Franklin Glass Co.* v. *White*, 14 Mass. 286 (1817), the act of incorporation permitted assessments and provided forfeitures. On the argument there was a distinction attempted by counsel between this and the foregoing

cases, on the ground that the case before the court was that of a corporation organized for private profit merely. The court, however, overruled the distinction, and held that there was no personal liability of the defendant to the corporation, though, under the Massachusetts law, in case of a deficiency of corporation assets, the stockholders were personally liable to answer an execution against the company.

The above cases have been considered by some, amongst others by the late Chief Justice REDFIELD (Redfield on Railways, § 49), as resting upon the fact that in them the shares were given no par value, but were simply made liable to assessments, and a line of cases, of which *The Cabot & West Springfield Bridge Co.* v. *Chapin*, 6 Cush. 50, is an example, gives support to this idea, and viewed in this light these cases are perhaps reconcilable with the current of authority elsewhere, but the court itself does not seem to have rested on that ground alone or principally in making its decisions, as appears from the words of PARSONS, C. J., in the first-mentioned case, in which the learned judge seems to import the rule of strict construction of the criminal law into remedial civil legislation.

It is, however, admitted that a subscription affords sufficient consideration for a promise to pay, when expressly made, and that in that case the mere existence of a right of forfeiture will not deprive the company of the action of assumpsit: *Worcester Turnpike Co.* v. *Williard*, 5 Mass. 80; *Taunton & South Boston Turnpike Co.* v. *Whiting*, 10 Mass. 331.

In New Hampshire, the same doctrine has obtained, having been announced in *The Franklin Glass Co.* v. *Alexander*, 2 N. H. 380 (1821), in which WOODBURY, J., remarked: "It is well settled that when an act of incorporation gives no express remedy against a member for assessments, he is liable to no action for them by virtue of his membership."

In Maine, in the case of *The Kennebec & Portland Railroad Co.* v. *Kendall*, 31 Me. 470 (1850), the subscription was simply for shares at $100 per share. The charter gave the power to ordain and establish such by-laws "as shall from time to time be deemed necessary and proper, &c.; also, *to make and collect such assessments* on the shares of the capital stock as may be deemed expedient, in such manner as shall be prescribed by their by-laws." A by-law was passed authorizing assessments and forfeiture for non-payment, and one holding the delinquent personally liable. SHEPLEY, C. J., said: "When the language of a charter or statute does not in terms authorize the corporation to make a call personally on a holder of stock, or impose upon him a personal obligation to pay, but authorizes a collection by sale of the shares, the construction in this and in most of the other states has been that no personal obligation to pay was imposed."

It will be observed that in this, unlike the Massachusetts cases, there was a value affixed to the shares of stock, and a consequent limitation of liability, so that this is an uncompromising statement and enforcement of the doctrine of the exclusive remedy by forfeiture.

These, it is believed, with a case to be hereafter noticed, are the principal cases in which it has been held that a special promise to pay for stock taken is necessary to render the subscriber, in the absence at least of a statutory enactment, liable in assumpsit. The case of *The Hartford & New Haven Railroad Co.* v. *Kennedy*, 12 Conn. 500 (1838), is a strong enunciation of the contrary doctrine. The charter of the company provided for a sale of stock in case of delinquency. The defendant subscribed and paid a portion of the price of the stock; the subscription-list contained

no express promise to pay. On a failure to pay assessments, the company waived the forfeiture and sued in assumpsit for the arrears. On the argument the Massachusetts and New Hampshire cases were brought to the notice of the court. HUNTINGDON, J., said: "It is true, a promise to pay in *precise terms* does not appear to have been made. The defendant has not affixed his signature to an instrument which contains the words *I promise to pay*, but he has done an equivalent act. He has contracted with the plaintiffs to become a member of their corporation, and to be interested in their stock to the extent of $100 for each share assigned him, if that amount be required. * * * When, therefore, the subscribers associated under the act and became stockholders to effect this object, and which could be accomplished only by the advance of money in payment of the instalments, it seems difficult to give any other legal meaning to their act than that it was equivalent to an express promise to pay their respective proportions of the capital when lawfully demanded. Such a construction of their engagement harmonizes with the entire design of their association, is in furtherance of its object, does no injustice to the stockholders, and affords all the security, which can reasonably be required by the public or the creditors of the corporation, that the object will be consummated and the debts of the company faithfully discharged." After noticing the Massachusetts cases, the learned judge spoke of the absence in them of an expressly given power to *demand* payment of assessments, and of the discretion given to the companies to fix the value of their stock, and continued: "We are not sure, however, that the highly respectable judicial tribunal which decided these cases was governed by any of the peculiar circumstances to which we have referred, nor will we confidently assert that the cases are not strongly analogous to or are distinguishable from the present case. If the court are to be understood as establishing and applying to all statutes in no sense penal, the position that, where a new power is given by a statute which also prescribes the mode of its execution, those who claim the power can exercise it in no other way, we feel constrained to say, we cannot give to decisions founded on such a position the force of law in this state. * * * When a common-law remedy is not taken away by the statute which prescribes a new one, the latter is merely cumulative. A statute made in the affirmative, without any negative expressed or implied, does not take away the common law: Co. Litt. 115."

This case was followed by *Ward* v. *Griswoldville Manuf. Co.*, 16 Conn. 593 (1844), in which WAITE, J., said: "What obligation did a stockholder assume upon himself when he subscribed for a share of the stock of this company? The answer obviously is that he agreed to pay the sum of $100 in such instalments, and at such time, as shall be required by the directors."

In New York, the earliest case in which the question of the remedy where a forfeiture is permitted by statute arose, is *Jenkins* v. *Union Turnpike Co.*, 1 Caines 381, and 1 Caines Cas. in error 86, (1804), wherein, though the case was ultimately decided against the company on another ground, LANSING, Ch. J., said, "This is an affirmative statute. It is a maxim of the common law that a statute made in the affirmative without any negative expressed or implied, doth not take away the common law. Therefore, the plaintiff may either have his remedy by the common law or upon the statute." L'HOMMEDIEU, Senator, who delivered the only other opinion, however, maintained the opposite, or as it may be called, the Massachusetts doctrine.

In *Troy Turnpike and Railroad Co.* v. *McChesney*, 21 Wend. 296 (1839), NELSON, Ch. J., said: "All the cases from 1 Caines 381 to 14 Johns. 238, show that the condition of forfeiture of stock and all previous sums paid, for the non-payment of any subsequent instalment, is but a cumulative remedy given to the company. * * * It is true the forfeiture clause is carried into the subscription papers. I cannot think that this circumstance alters the case."

In *The Fort Edward and Fort Miller Plank-road Co.* v. *Payne*, 17 Barb. 569 (1854), the main question as to the effect of a stock subscription *per se*, was considered, HAND, P. J., saying: "I think the principle to be deduced from the decisions is that if the act of incorporation or any public statute declares the subscription to the stock or the proprietor of the shares shall pay calls made thereupon, or if he agrees to do so, whether in the articles of association or other legal instrument, he is personally liable, even although the corporation has power to forfeit his stock for non-payment. * * * But where there is a right of forfeiture given, either by the act of corporation or by the terms of the subscription, but no absolute duty to pay is imposed by statute, and there is no promise to pay, neither the subscriber to the stock nor the shareholder is personally liable to the corporation for calls." He then raised an implied promise from a prior article of association. This case was reversed, 15 N. Y. 583, on another ground, but no opinion was given by the Court of Appeals on the position taken by the court below on the subject of the subscription; but in *The Buffalo and New York Railway Co.* v. *Dudley* 14 N.Y. 336 (1856), the question was fairly met by the Court of Appeals, T. A. JOHNSON, J., delivering the opinion, saying: "I am of opinion, therefore, that the agreement which the defendant subscribed is only an agreement to take the stock of the corporation. But upon this undoubtedly the law raises an undertaking to pay the amount subscribed." It had been previously so held by a Supreme Court in *Rensaeller and Washington Plank-road Co.* v. *Wetzel*, 21 Barb. 56 (1855); see also *Troy and Boston Railroad Co.* v. *Tibbets*, 18 Barb. 297.

It is also held that while the remedies of forfeiture and by action are cumulative, yet a resort to the former will bar the latter, on the ground of a rescission of the original contract between the company and the subscriber: *Buff. and N. Y. Railway Co.* v. *Dudley*, *supra*; *Small* v. *Herkimer Manufacturing Co.*, 2 Conn. 330, reversing 21 Wend. 273.

The first question does not seem to have arisen fairly in Pennsylvania. In the first case there on the subject of subscription—*Delaware Canal Co.* v. *Sansom*, 1 Binney 70 (1803)—there was a power of forfeiture given by statute and a subscription paper headed as follows: "We * * * * promise to pay the sum of $200 for every share of stock in the said company in such manner and proportions and at such times as shall be determined by the president and managers," &c. This was held a sufficient promise to bind the original subscriber; as to the remedy, it was held that the forfeiture might be waived and suit brought for instalments. YEATES, J., however, SMITH, J., concurring, intimated that an express promise was necessary to hold the subscriber, though an opinion on that point was not called for in the phase assumed by the case. In *Merrimac Mining Co.* v. *Levy*, 4 P. F. Smith 229 (1867), STRONG, J., delivering the opinion of the court, showed a decided tendency to follow the case in 12 Conn., and his language would justify the syllabus, which is as follows: "By the act of subscribing to the capital stock of an incorporated association each associate undertakes to raise his proportion of

the capital as it may be called for by the directors." In *Franks Oil Co.* v. *McCleary*, 13 P. F. Smith 319 (1869), however, THOMPSON, Ch. J., remarks on the foregoing case and reduces its effect to that of a mere registration of the law of Michigan, as expounded by the Supreme Court; the case having arisen under a Michigan charter, although the language of Judge STRONG would seem to take a broader range, and to be a species of precursor of his opinion in the principal case. We may, therefore, say that in Pennsylvania the question as to the personal liability of an original subscriber without a special promise, is unsettled, but that the law is, that forfeiture, where given, is a merely cumulative remedy and may be waived.

That forfeiture is a merely cumulative remedy is also held in Illinois: *Klein* v. *Alton and Sangamon Railroad Co.*, 13 Ill. 514 (1851); *Peoria and Oquawka Railroad Co.* v. *Elting*, 17 Ill. 429 (1856); in Mississippi: *Freeman* v. *Winchester*, 10 Sm. & M. 577 (1848); in Michigan: *Dexter and Mason Plankroad Co.* v. *Millerd*, 3 Mich. 91 (1854). In Michigan indeed the cases go even further, and after a sale of the stock, which sale has not brought enough to cover the arrears, allow assumpsit to be brought for the deficiency. See *Carson* v. *Arctic Mining Co.*, 5 Mich. 288, in which a distinction is taken between a sale and a forfeiture.

III. The liability of a transferree of stock for calls, made after he has become a proprietor of stock.

Of course, in those states where an express promise to pay has been held necessary to hold the original subscriber, in the absence of any duty imposed by statute, or declared thereby to arise out of the mere ownership of shares, *à fortiori* the transferree cannot be held in the absence of a promise to pay on his part: *Franklin Glass Co.* v. *Alexandar*, *supra*, is a fair statement of this view of the law.

In Connecticut, in *The Hartford and New Haven Railroad Co.* v. *Boorman*, 12 Conn. 531 (1838), HUNTINGDON, J., said: "The reasons for our decision, subjecting the original subscribers to personal liability, apply with equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is established."

In New York, *Mann* v. *Currie*, 2 Barb. 294 (1848), it is said: "If he became a holder by a transfer to him of the stock of an original subscriber, he at once adopted his contract and became substituted in his place, both as regards his rights and liabilities."

In Maryland, *Bend* v. *Susquehanna Bridge and Banking Co.*, 5 Har. & J. 128 (1823), the court said: "The charter authorizing transfers and declaring all 'who may become the actual proprietors of shares in the capital stock, either as subscribers for the same or as the legal representatives, successors or assignees of such subscribers,' to be a body politic and corporate, necessarily creates a privity and raises an assumpsit, on the part of such as choose to become stockholders by accepting transfers, to pay all such calls as may be regularly made, on which an action will properly lie."

This case follows very closely Lord KENYON's opinion in *Huddersfield Canal Co.* v. *Buckley*, 7 T. R. 36 (1796), wherein he said: "After the assignment the assignees hold the shares on the same conditions, and are subject to the same rules and orders as the original subscribers, and are to all intents and purposes substituted in the place of the original subscribers."

In Pennsylvania, in *The Canal Co.* v. *Sansom*, *supra*, YEATES, J., said: "The shares the defendant holds as transferree stand on a different ground; as to them he has given no express promise to pay, and the act has made no other pro-

vision than that the shares should be forfeited." The case was followed in *Palmer* v. *Ridge Mining Co.*, 10 Casey 288 (1859), criticised in *Merrimac Mining Co.* v. *Levy*, *supra*, but recognised as binding authority in *Franks Oil Co.* v. *McCleary*, *supra*.

In *The Merrimac Mining Co.* v. *Bagley*, 14 Mich. 501 (1866), the court said: "There is no principle of law which can establish any difference among stockholders in the duties which are implied from that relation. The very essence of a corporation consists in its corporate succession, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares."

The statement in Angel & Ames, sect. 534, quoted in the opinion, as to the shifting of the burden from the outgoing subscriber to the incoming stockholder, so far as it relates to the relief of the former, is a little too broadly put, and is unsupported by some at least of the authorities cited in the foot-note. The *Aylesbury Railway Co.* v. *Mount*, 5 Scott N. R. 127, and *The West Philadelphia Canal Co.* v. *Innis*, 3 Whart. 198, were not actions against original subscribers; while in *Cowles* v. *Cromwell*, 25 Barb. 413, the bank had assented to the transfer. *Brigham* v. *Mead*, 10 Allen 245, would seem to go the length of the text-book statement, but the report contains no very full statement of facts. On the other hand, there is authority to the effect that in order to protect itself, the corporation has a right to refuse to release an original subscriber by the acceptance of a new stockholder, until the stock is fully paid up. In *Everhart* v. *The Philadelphia & West Chester Railroad Co.*, 4 Casey 339 (1857), the company refused to permit a transfer, and brought suit against the subscriber for arrears after the attempted assignment. In the Court of Common Pleas, HAINES, P. J., charged as follows: "A contract for the purchase of shares of the capital stock of a joint-stock company, like other contracts of sale and purchase, is binding until performed or released by the concurring assent of the parties, and consequently a buyer of such stock cannot discharge himself of his liability to pay for it by a transfer of it to a third party, without the consent of the company." He also held that the company could not arbitrarily withhold its assent, but only for cause. The verdict and judgment were for the company, which judgment was affirmed by the Supreme Court, though the judges differed on the grounds of affirmance. WOODWARD, J., said: "On the next question, which relates to the right of the defendant to transfer his stock so as to escape liability for the unpaid instalment, we are a divided bench; but a majority concur, though for different reasons, in holding him liable, notwithstanding the transfer he made. Two of us think that he had a perfect legal right to assign on any terms he pleased, but that unless it was done with the assent of the company, he remained liable for the unpaid portion of his subscription. One of our number is of opinion that if the assignment had been bonâ fide it would have released him from further liability, but that the record showing it was *mala fide* he remains liable." LEWIS, C. J., said: "Whether the transfer was fair or fraudulent, whether with the consent of the company or without it, whether entered on the books or not, whether the purchaser became liable for the instalments unpaid or not, there is nothing in the law or in the nature of the transaction, which discharges the original subscriber from his express written engagements to pay the money."

In a similar case, decided in the fall of the same year, *Pittsburgh & Steubenville Railroad Co.* v. *Clarke et al.*, 5 Casey 146, in the court below, HAMPTON, P. J., had rested upon the law as stated in Angel & Ames, sect. 534, and left to

the jury the question of bona fides only. The jury found for the defendants. The Supreme Court reversed the decision, laying down the broad rule: "Until the stock is fully paid up, the corporation has a right to refuse to receive new members in place of the original adventurer." This case was recognised and followed in *Graff* v. *Pittsburgh & Steubenville Railroad Co.*, 7 Casey 489 (1858).

IV. As to the right of creditors, or officers representing them as an assignee in bankruptcy or a receiver, to compel the payment of unpaid subscriptions to stock. It may be premised that it is held that the insolvency of a company is no ground for restraining the collection of unpaid subscriptions or calls: *West Chester & Philadelphia Railroad Co.* v. *Thomas*, 2 Phila. 344; *Dill* v. *Wabash Valley Railroad Co.*, 21 Ill. 91, where the court said: "The insolvency of the company can constitute no ground for restraining the collection of these judgments [for calls]. Indeed it shows the more urgent reason why they should be collected. It is due to the creditors of the company that it should make available all its resources and faithfully apply the proceeds to the payment of its debts."

In *Wood* v. *Dummer*, 3 Mason 308 (1824), STORY, J., said: "It appears to me very clear, upon general principles, as well as the legislative intent, that the capital stock of banks is to be deemed a pledge or a trust fund for the payment of the debts contracted by the bank."

Ward v. *Griswoldville Manufacturing Co.*, *supra*, was a bill filed by creditors to compel the company to make a call for unpaid subscriptions. The bill was sustained, the court holding that the discretion of the directors as to making calls was "merely *neodal*, relating to the time and manner of making the payments." That a creditor can compel the payment of an unpaid subscription when the corporation is insolvent, is held in *Henry* v. *Vermillion & Ashland Railroad Co. and Stockholders*, 17 Ohio 187 (1848).

In *Mann* v. *Pentz*, 3 N. Y. 422 (1850), the doctrine of a trust fund mentioned by Judge STORY, and so ably urged in the principal case, was recognised. In *Rankins* v. *Elliott*, 16 N. Y. 377 (1857), the right of action for arrears in calls and subscriptions is said to rest with the receiver. *Seymour* v. *Sturgess*, 26 N. Y. 134 (1862), alluded to in the opinion, was a case of somewhat peculiar character. It was an action brought by a bond creditor to recover from a stockholder the amount still due upon his shares, the corporation having failed to meet its obligations. In the original bonds there was a special agreement, "the obligee and his assigns are to look only for payment of it to the corporation, and out of its funds and property." The bonds were not met and a new series was issued, secured by a trust of the corporation funds and property. The by-laws gave the directors power to make calls to the par value, provided each call should be made by at least five directors, and gave the power of forfeiture. The certificates expressly rendered the stock "subject to a further payment of $35 per share." No call had been made. ALLEN, J., said: "The most that could be implied from a subscription to the capital stock, or an acceptance of a certificate of stock, would be a promise to pay upon the request of the promisee [the company]," and held, that there must be a call made by the five directors; without such a call "the defendant could not be made liable to pay to the corporation, * * * and if not to the corporation, then not to any one standing in the place of the corporation, either by assignment, succession or act and operation of law." Later, the court seemed to rest its deci-

sion on broader ground: "They became stockholders by paying the amount fixed by law or agreed upon with the corporation, and taking certificates of stock with a clause in them stating the further payments to which the stock might be subjected by order of the directors, thus making the title of the purchaser or stockholder a conditional title under the by-laws depending on the payment of the future calls, but leaving such payment optional with them." The opinion then goes on to compare the liability to pay to a lien on the stock.

It will be seen that the court lost sight of what seems to be the key of the subject, viz.: That subscribed capital is a trust fund for the protection of the creditors of the corporation, in which view, while the fact that no call had been made by the five directors might be a valid defence in an action by the company, yet a creditor would stand on a different footing, and in regard to this case, which seems in conflict with the authority of cases in its own state, most lawyers would agree with Judge STRONG that it does not "assert the doctrine which is generally accepted," and at any rate there would seem to be no doubt that an assignee in bankruptcy, who not only represents the creditors, but possesses the powers of the corporation, so far as necessary to render available its assets, could collect the amount of an unpaid sum due upon the company's stock.

H. BUDD, JR.

Supreme Court Commission of Ohio.

WILLIAM H. GROGAN v. EMMA G. GARRISON.

Under section two of the Dower Act (1 S. & C. 516), an estate conveyed as jointure, to be a good legal or statutory bar to dower, must be such an estate, as to certainty and kind, that the wife, on the death of her husband, may take possession of, and hold in severalty, and not in common with others.

If the estate so conveyed be such as that at common law dower could be assigned by metes and bounds, then in such case the jointure, to be a legal bar to dower, should be an estate in severalty, so that the widow may enter and hold in severalty, without being compelled to resort to an action to have her jointure assigned to her by metes and bounds.

An antenuptial contract which conveys an undivided one-third part, or any other interest in common with others, in lieu of dower, is not a good statutory bar.

Whether such an estate will constitute a good equitable jointure depends on the facts and circumstances of the case, and when such contract is pleaded by way of equitable defence to an action for dower, the facts upon which it depends, and not the pleader's conclusions from the facts, must be stated.

The conveyance of an estate as jointure, of an undivided one-third of a lot of land for the life of the wife, when such lot is less than one-third of the husband's lands, is *primâ facie* not a good equitable jointure, in the absence of facts showing that the same is fair and reasonable, or of such acts of the widow as amount to an estoppel.

The antenuptial covenant of a woman, that in case she survive her husband she will not claim dower in his estate, cannot, in an action by her for dower, operate to bar such action, either by way of release or estoppel, where such antenuptial contract does not constitute either a legal or equitable bar.